No. 88-1559

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1988

GLENPOOL UTILITY SERVICES AUTHORITY,
a Utility Trust,
Plaintiff-Petitioner,

vs.

CREEK COUNTY RURAL WATER DISTRICT NO. 2,
Defendant-Third-Party-Plaintiff-Respondent,

and

JODY SWEETIN, an Individual,
Defendant-Intervenor,

vs.

FARMERS HOME ADMINISTRATION, UNITED STATES DEPARTMENT OF AGRICULTURE, UNITED STATES OF AMERICA,
Third-Party-Defendants-Respondents.

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FARMERS HOME ADMINISTRATION, UNITED STATES DEPARTMENT OF AGRICULTURE, UNITED STATES OF AMERICA,
Third-Party-Defendants-Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, TENTH CIRCUIT

(Counsel On Inside Front Cover)

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

FRAZIER, SMITH & PHILLIPS
PHIL FRAZIER
(Counsel of Record)
1424 Terrace Drive
Tulsa, Oklahoma 74104
(918) 744-7200
Attorney for Petitioner

QUESTIONS PRESENTED FOR REVIEW

The Appellant presents to this Court two questions for review:

1. WHETHER THE CONSTITUTION OF THE STATE OF OKLAHOMA WHICH PROHIBITS LEGISLATION GRANTING AN EXCLUSIVE RIGHT TO ASSOCIATIONS, CORPORATIONS OR INDIVIDUALS RENDERS STATE STATUTE 82 O.S. SECTION 1324.10 (Supp. 1988) UNCONSTITUTIONAL AND THEREBY PROHIBITS IMPLEMENTATION OF FEDERAL STATUTE 7 U.S.C. SECTION 926(b).

2. IF THE OKLAHOMA CONSTITUTION DOES NOT PROHIBIT OKLAHOMA STATUTORY LAW PERMITTING IMPLEMENTATION OF 7 U.S.C. 1926(b) THEN SHOULD NOT THE REQUIREMENTS AS WELL AS THE CONSTRAINTS OF 7 U.S.C. SECTION 1926(b) BE APPLIED EQUALLY TO BOTH GLENPOOL UTILITY SERVICES AUTHORITY AND CREEK COUNTY RURAL WATER DISTRICT NO. 2.

ADDITIONAL PARTIES TO THE PROCEEDING BEFORE THE TENTH CIRCUIT

In addition to the parties named within the caption of this proceeding the following parties have entered appearances Amicus Curiae: City of Owasso, Oklahoma; Oklahoma Municipal League Association; City of Tulsa, Oklahoma; City of Broken Arrow, Oklahoma; Oklahoma Municipal Attorneys Association and, an individual, Jody Sweetin. Additional interested parties on behalf of the Defendants were the following: The Oklahoma Rural Water Association; Green Valley Water Supply Corporation; Springs Hill Water Supply Corporation; Johnson Rural Water; Bear Creek Water Association and National Rural Water Association.

28 U.S.C. Section 2403(b) is applicable; although the constitutional issues raised herein have not been certified by the Court to the Attorney General for the State of Oklahoma.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, TENTH CIRCUIT

COMES now GLENPOOL UTILITY SERVICES AUTHORITY, a Utility Trust, and respectfully presents its Petition for Certiorari.

OPINIONS DELIVERED BY THE COURTS

The Appellant attaches hereto and makes a part hereof the Findings of Fact and Conclusions of Law of the Trial Court for the Northern District of Oklahoma Honorable H. Dale Cook presiding, A1-A10. Also attached is Judgment for the Trial Court, A11-A12.

Attached hereto and made a part hereof is the Judgment of the Court of Appeals, Tenth Circuit, United States, A13-A25 and Denial of Rehearing, A26-A27.

JURISDICTION

The jurisdiction of the United States District Court for the Northern District of Oklahoma was invoked under 28 U.S.C. Section 1441. An appeal was timely presented to the United States Court of Appeals for the Tenth Circuit, jurisdiction being conferred on the United States Court of Appeals, Tenth Circuit pursuant to 28 U.S.C. Section 1291.

This Petition for Writ of Certiorari is to review a judgment entered on November 21, 1988, and an order denying rehearing which was entered by United States Court of Appeals on the 23rd day of December, 1988.

The jurisdiction of this Court to review the judgment of the Tenth Circuit is invoked under 28 U.S.C. Section 1254(1), and, the case of *Ruhlin v. New York Life Insurance Company,* (1938) 304 U.S. 202, 82 L.Ed. 1290, 58 S.Ct. 860 and *Dorchy v. Kansas,* (1924) 264 U.S. 286, 68 L.Ed. 686, 44 S.Ct. 323, and Rules of the Supreme Court, Part V, Rule 17.

APPLICABLE CONSTITUTIONAL PROVISIONS, AND STATUTES THAT THE CASE INVOLVES

Oklahoma Constitution

Article V, Section 51 of the Oklahoma Constitution is as follows:

> Exclusive rights, privileges or immunities—the Legislature shall pass no law granting to any association, corporation, or individual any exclusive rights, privileges or immunities within this State.

Oklahoma Statutes, Title 82, Section 1324.10(14) is as follows:

> Powers of District.—A. Every district incorporated hereunder shall have perpetual existence, subject to dissolution as provided by this act, and shall have power: (14). to enter into contracts with the United States of America, or any agency thereof, or the state, or any political subdivision or agency thereof, for the construction, operation and maintenance of structures needed to provide water storage to meet present and future anticipated needs and demands of the district.

Title 7 U.S.C. Section 1926(b) is as follows:

> The service provided or made available through any such association shall not be curtailed or limited by inclusion of the area served by such association within the boundaries of any municipal corporation or other public body, or by the granting of any private franchise for similar service within such area during the term of such loan; nor shall the happening of any such event be the basis of requiring such association to secure any franchise, license, or permit as a condition to continuing to serve the area served by the association at the time of the occurrence of such event.

STATEMENT OF THE CASE

GLENPOOL UTILITY SERVICES AUTHORITY is a Utility Trust operated for the benefit of the City of Glenpool, Oklahoma. CREEK COUNTY RURAL WATER DISTRICT NO. 2 is a rural water district which had, at times prior to commencement of this litigation furnished water to areas within the municipal limits of the City of Glenpool. The FARMERS HOME ADMINISTRATION, United States Department of Agriculture, United States of America, had made a loan to both Plaintiff and Defendant, although Plaintiff, prior to trial paid in full its mortgage.

Plaintiff and Defendant, sought at the Trial Court level a decision determinative of their rights as the exclusive provider of water services to an area known as "Eden South" which was a residential development located within the City Limits of Glenpool, Oklahoma and also within the rural water district boundaries of CREEK COUNTY RURAL WATER DISTRICT NO. 2. The case was presented to the Court through a non-jury trial and also through briefs, including post-trial briefs.

The Trial Court ruled that neither party could claim an exclusive right to provide water service to the area in question because of Oklahoma's Constitutional provision prohibiting exclusivity. The Defendant CREEK COUNTY RURAL WATER DISTRICT NO. 2 and third-party defendant FARMERS HOME ADMINISTRATION, UNITED STATES DEPARTMENT OF AGRICULTURE, UNITED STATES OF AMERICA brought their appeal before the United States Court of Appeals, Tenth Circuit. The appeal to the Tenth Circuit was based upon a reurging of exclusivity and applicability of 7 U.S.C. Section 1926(b). The GLENPOOL UTILITY SERVICES AUTHORITY, a Utility Trust, reurged the position taken by the Trial Court and further, and in the alternative, asserted that if 7 U.S.C. Section 1926(b) was applicable and proper in spite of the Oklahoma Constitutional provision then, in that event, both GLENPOOL UTILITY SERVICES AUTHORITY, and CREEK COUNTY RURAL WATER DISTRICT NO. 2 would have concurring right to furnish water to the disputed area inasmuch as both of the parties had had similar loans through FARMERS HOME ADMINISTRATION, UNITED STATES DEPARTMENT OF AGRICULTURE, UNITED STATES OF AMERICA, at the time the water lines were installed and when water service began to be provided by GLENPOOL UTILITY SERVICES AUTHORITY and both were under the constraints of 7 U.S.C. Section 1926(b). This position was raised to the United States Court of Appeals in oral argument before the Court as well as in briefs submitted to the Court and on Application for Rehearing.

The United States Court of Appeals, Tenth Circuit, reversed and remanded the decision of United States District Court for the Northern District of Oklahoma.

SUBSTANTIAL QUESTION

The questions presented on this appeal are substantial in that the decision will have effect not only upon the future of the City of Glenpool, Oklahoma by and through the GLENPOOL UTILITY SERVICES AUTHORITY, but also upon all other cities similarly situated throughout the United States. Similarly, the decision will have an effect upon all rural water districts. In addition, procedure for putting into effect federal financing through FARMERS HOME ADMINISTRATION will be directly affected by the decision of the Court.

In addition to the far reaching effect of the final decision, it is imperative that final decision be rendered regarding the application of State Constitutional Law as it affects the enabling statute of the State of Oklahoma which in turn authorizes the application of the Federal Statute, to wit: 7 U.S.C. Section 1926(b).

In addition, should this Court determine that 7 U.S.C. Section 1926(b) is applicable and enforceable in spite of the State Constitutional prohibition against such exclusivity, then a second question must be decided pertaining to equal enforcement and application of 7 U.S.C. Section 1926(b).

This case presents a circumstance where both GLENPOOL UTILITY SERVICES AUTHORITY and CREEK COUNTY RURAL WATER DISTRICT NO. 2 were, at the time the water service was commenced, indebted to FARMERS HOME ADMINISTRATION and both were under the same constraints as imposed by 7 U.S.C. Section 1926(b). The loan to FARMERS HOME ADMINISTRATION was subsequently paid by GLENPOOL UTILITY SERVICES AUTHORITY, but not until after the

water service was installed and provided to the area in question.

7 U.S.C. Section 1926 states in part—the service provided or made available through such association shall not be curtailed or limited—; the statute makes no reference to future services or anticipated services nor does it make any reference to future growth. The service area in question giving rise to this litigation was both within the boundaries of the Rural Water District No. 3 and also within the Municipal Corporate limits of the City of Glenpool, Oklahoma, which is beneficiary under the GLENPOOL UTILITY SERVICES AUTHORITY.

If 7 U.S.C. Section 1926(b) is to be followed to the letter, then that requirement at the time the service was provided by the GLENPOOL UTILITY SERVICES AUTHORITY must apply equally to both parties inasmuch as they were both under the same mandate by contract to FARMERS HOME ADMINISTRATION.

The Defendants rely largely upon the case of *Rural Water District No. 3 v. Owasso Utility Authority*, 530 F. Supp. 818. However, the cases are distinguishable. In *Rural Water District No. 3 v. Owasso Utility Authority*, the Rural Water District was providing water service to the area at the time Owasso Utility Authority encroached upon such service. In the instant case, the Rural Water District was not providing the service although its lines were in the adjacent area. Also, Owasso was not under financing with FARMERS HOME ADMINISTRATION to wit: 7 U.S.C. Section 1926(b) as was GLENPOOL UTILITY SERVICES AUTHORITY at the time the service was provided.

This case is further distinguishable from the Owasso case as well as other cases cited by the Defendants in

that at the Trial Court level exhibits were presented to the Court by the GLENPOOL UTILITY SERVICES AUTHORITY establishing that the Rural Water District had advised the GLENPOOL UTILITY SERVICES AUTHORITY that they were no longer able to furnish the quantities of water demanded by GLENPOOL UTILITY SERVICES AUTHORITY, and further, had directed GLENPOOL UTILITY SERVICES AUTHORITY to find another source of water. (Trial Court Exhibits - Defendant's Exhibit 16, Plaintiff's Exhibit 11 & 12). Within the contractual agreement between GLENPOOL UTILITY SERVICES AUTHORITY and CREEK COUNTY RURAL WATER DISTRICT NO. 2, Paragraph no. 5 the Defendant's Exhibit 16, states as follows:

> 5. *Successor to District.* In the event of any occurrence rendering the district incapable of fulfilling this contract, any successor to the district, whether the result of legal process, assignment or otherwise, shall succeed to the rights of the district herein.

At the Trial Court level, the Rural Water District contended that it could have made water service available to the disputed area at some future time. However, the exhibits presented by both parties clearly established that the Rural Water District had, for several years prior to the dispute advised GLENPOOL UTILITY SERVICES AUTHORITY that it could no longer provide the City of Glenpool with a quantity of water sufficient to meet its demands, and further, had directed that the City of Glenpool by and through its trust, GLENPOOL UTILITY SERVICES AUTHORITY obtain another source of water service.

It was through this directive that GLENPOOL UTILITY SERVICES AUTHORITY subsequently obtained an

additional source of water and established a water tower storage system and transmission lines through financing with the FARMERS HOME ADMINISTRATION. Within the financing documents between GLENPOOL UTILITY SERVICES AUTHORITY and FARMERS HOME ADMINISTRATION, the GLENPOOL UTILITY SERVICES AUTHORITY came under the same obligation and/or protection as does CREEK COUNTY RURAL WATER DISTRICT NO. 2, to wit: 7 U.S.C. Section 1926(b). Although at least seven other Circuit Courts have ruled on the exclusivity issue of 7 U.S.C. 1926(b), none has had the question presented where there is an apparent state constitutional provision prohibiting the implementation of any statute giving rise to exclusivity, and further, no Court has had presented to it the issue of applicability of two water providers both coming under 7 U.S.C. 1926(b) at the same time with both of the water providers seeking to provide service to the same area.

CONCLUSION

Petitioner concludes that inasmuch as Article V, Section 51 of the Oklahoma Constitution prohibits the passing of any legislation which grants exclusive rights or privileges, it follows that Oklahoma Statutes, Title 82, Section 1324.10(14) is unconstitutional. That statute has been utilized to permit Rural Water Districts as well as Utility Services Authority (GLENPOOL UTILITY SERVICES AUTHORITY) to enter into contract with FARMERS HOME ADMINISTRATION and thereby implement Title 7 U.S.C. Section 1926(b). Under the federal statute services provided by an entity financed through FARMERS HOME ADMINISTRATION can in essence, become exclusive until the mortgage is paid.

Inasmuch as the growth within a water district is a certainty, it is an equal certainty that the mortgage i.e. need for continuing funding, will be self-perpetuating through the need to extend water services, refinance water services, etc.

It is necessary for clarity of future financing through FARMERS HOME ADMINISTRATION loans, that Rural Water Districts and Municipalities situated throughout the United States be aware of who, if either, shall have the obligation and/or right to furnish water services to a given area when both the Rural Water District and the Utility Services Authority are financed through FARMERS HOME ADMINISTRATION, to wit: 7 U.S.C. 1926(b).

Respectfully submitted,

FRAZIER, SMITH & PHILLIPS
PHIL FRAZIER
(Counsel of Record)
1424 Terrace Drive
Tulsa, Oklahoma 74104
(918) 744-7200
Attorney for Petitioner

CERTIFICATE OF MAILING

I hereby certify a true and correct copy of the above and foregoing Instrument was mailed on this 17th day of March, 1989, with proper postage thereon fully prepaid to the following:

Amici for the Municipalities:

Mr. Ronald Cates
12620 E. 86th Street North
Owasso, OK 74055
Amicus for Owasso

Ms. Lynn Rogers
1900 First National Center West
Oklahoma City, OK 73102
Amicus for Oklahoma Association

Ms. Diane Pedicord
201 N.E. 23rd
Oklahoma City, OK 73105

Mr. Patrick Boulden
200 Civic Center
Tulsa, OK 74115
Amicus for City of Tulsa

Mr. Michael Vanderberg
200 Municipal Center
Broken Arrow, OK 74102

Appellant:

Mr. Louis T. Rosenberg
Rosenberg & Gray
Charles Court
205 N. Presa
Building B, Suite 200
San Antonio, TX 78205

Mr. Peter R. Steenland, Chief
Appellate Section
Land and Natural Resources Division
U.S. Department of Justice, Room 2339
Tenth and Pennsylvania Avenue, NW
Washington, DC 20530

Ms. Laura Frossard
Appellate Section
Land and Natural Resources Division
U.S. Department of Justice, Room 2339
Tenth and Pennsylvania Avenue, NW
Washington, DC 20530
Attorney for FHA

Mr. Tony Graham
Office of the U.S. Attorney
333 W. Forest
Tulsa, OK 74103
Attorney for FHA

Mr. Peter Bernhardt
Office of the U.S. Attorney
333 W. Forest
Tulsa, OK 74103

Appellees:

Mr. Stephen L. Andrew
Attorney at Law
Tulsa Union Depot, Suite 100
111 E. 1st Street
Tulsa, OK 74103
Attorney for Creek County Rural
Water Association

Mr. D. Kevin Ikenberry
Tulsa Union Depot
111 E. 1st Street
Tulsa, OK 74103

Other:

Mr. Louis Lævy
Attorney for Jody Sweetin
5200 S. Yale
Tulsa, OK 74135

Robert Henry
Attorney General
State of Oklahoma
112 State Capitol Building
Oklahoma City, OK 73105

Solicitor General
Department of Justice
Washington, DC 20530

PHIL. FRAZIER

APPENDIX

(Filed July 16, 1986)

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF OKLAHOMA

No. 84-C-415-C

GLENPOOL UTILITY SERVICES AUTHORITY,
a Utility Trust,
Plaintiff,

vs.

CREEK COUNTY RURAL WATER DISTRICT NO. 2,
and JODY SWEETIN, an individual,
Defendants,

-and-

CREEK COUNTY RURAL WATER DISTRICT NO. 2,
Third Party Plaintiff,

vs.

FARMERS HOME ADMINISTRATION, UNITED
STATES DEPARTMENT OF AGRICULTURE,
UNITED STATES OF AMERICA,
Third Party Defendants.

FINDINGS OF FACT

and

CONCLUSIONS OF LAW

This matter came on before the Court for nonjury trial on April 4, 1985. Plaintiff Glenpool Utility Services

Authority (Glenpool) filed a state court action on February 9, 1984, requesting a declaratory judgment as against defendant Creek County Rural Water District No. 2 (District No. 2), adjudging plaintiff to be the holder of the exclusive right to furnish water to an area of land known as Eden South, annexed by the City of Glenpool in July of 1983. Defendant District No. 2 counterclaimed and asked for a declaratory judgment on its behalf to the effect that it has the exclusive right to furnish Eden South and also requested an injunction issue to enjoin plaintiff Glenpool from constructing water lines to Eden South for the purpose of providing water services to the area. Defendant District No. 2 also brought a third party petition as against Farmers Home Administration, United States Department of Agriculture, United States of America (FmHA), joining FmHA as the holder of a real estate mortgage on land including Eden South. The action was removed to this Court on May 11, 1984. By the July 23, 1984 order of this Court, Mr. Jody Sweetin, owner of the tract of land at issue, was allowed to intervene as a defendant in this case.

The issue before the Court for its determination is whether, considering Title 7 United States Code §1926(b) and in view of the facts presented to the Court, plaintiff Glenpool or defendant District No. 2 has the right to be the exclusive provider of water service to Eden South. After considering the pleadings, exhibits admitted at trial, testimony, stipulated facts, briefs, and arguments presented by counsel for the parties, and being fully advised in the premises, the Court enters the following findings of fact and conclusions of law pursuant to F.R.Cv.P. 52.

FINDINGS OF FACT

1. The Court has jurisdiction of this action pursuant to Title 28 United States Code Sections 1331, 1346, and 1441.

2. Venue is proper in this federal judicial district pursuant to Title 28 United States Code Section 1391.

3. Plaintiff Glenpool Utility Services Authority (Glenpool) is a public trust, the City of Glenpool, Oklahoma, being the beneficiary, said trust having been created pursuant to the laws of the State of Oklahoma for the purpose of providing utility services, including water and sewer to areas inside and outside the corporate limits of the City of Glenpool.

4. Defendant Creek County Rural Water District No. 2 (District No. 2) was incorporated by the Board of County Commissioners of Creek County, Oklahoma, on October 19, 1964, and was to provide water service within these territorial limits:

> Sections 13 through 17 and Sections 20 through 24, T17N, R11E, Creek County;
>
> Sections 1 through 29, T17N, R12E, Tulsa and Creek Counties;
>
> Sections 4 through 9, Sections 19, 20, and 30, T17N, R13E, Tulsa County; and
>
> Sections 1 through 4, Sections 9 through 17, Sections 20 through 29, Sections 31 through 36, T18N, R12E, Tulsa and Creek Counties.

5. On March 27, 1967, additional territory was annexed into the District No. 2 territory, consisting of the following described lands:

> Sections 1, 2 and 3, T16N, R12E, Tulsa County;

Section 6, T16N, R13E, Tulsa County;

Sections 34, 35, 36, T17N, R12E, Tulsa County;

Section 31, T17N, R13E, Tulsa County; and

Sections 30, 31, 32 and 33, T17N, R12E, Creek County.

6. Defendant Mr. Jody Sweetin is the owner of the real property known as Eden South, a quarter section tract of land located in Tulsa County, Oklahoma, and within the 1967 annexed territory of defendant District No. 2, legally described as:

The Southwest Quarter (SW¼), Section 35, T17N, R12E, I.B.M., Tulsa County, State of Oklahoma.

7. The third party defendant, Farmers Home Administration, United States Department of Agriculture, United States of America (FmHA), is the holder of a mortgage covering real property, physical facilities now owned and to be acquired, grants, franchises, rights of way and easements now owned by District No. 2 and those acquired in the future, along with other property, as security for construction money loaned to District No. 2. The rural water system was built with the money loaned by FmHA. The amount of the mortgage is approximately $920,000, which secures all the property contained within the territory of defendant District No. 2.

8. FmHA also loaned $443,000 to plaintiff Glenpool, secured by a real estate mortgage covering the property located within the City of Glenpool as well as all grants, franchises, rights, easements and facilities of the City of Glenpool owned on that date or acquired in the future, for the construction of a water tower and water lines to service the residents of the City of Glenpool with water. Plaintiff and the City of Glenpool paid off this loan from FmHA on October 30, 1984.

9. On January 4, 1983, the City of Glenpool annexed a rectangular belt of land, including the Eden South property, into the city limits of the City of Glenpool, Oklahoma, but the land also remained in the territory of District No. 2. This land was not adjacent to any residential, business or commercial property of the City of Glenpool. The land was adjacent to the then existing rights-of-way for the then existing county roads and state highways—the "fence line" of the City of Glenpool—located approximately two miles to the south of any Glenpool property not a "fence line".

10. Plaintiff was aware that District No. 2 claimed an exclusive right to service the Eden South area with water prior to the annexation of the area and prior to Mr. Sweetin's laying of water service transmission lines.

11. At time of trial, plaintiff Glenpool was providing the water service to individuals who reside in Eden South.

12. FmHA's loan to defendant District No. 2 never has been nor is now in default.

13. Defendant District No. 2 does not, as a rule, lay water lines on both sides of a street. It has, though, a line on the south side of 171st Street and one on the west side of Union Avenue, which is directly across the street, a distance of approximately 50 feet, from the Eden South addition. District No. 2 cannot refuse to serve an applicant within its territory, even if no line is present and the need for an extension or road bore must be met by virtue of the application. Any prospective user in the territory of District No. 2 can receive water service from District No. 2 by making an application and paying the customary fee. At that point,

District No. 2's obligation would be to provide a connection and supply the water.

In view of the foregoing, the Court finds defendant District No. 2 could and would provide water service to Eden South within a reasonable time following application for same.

CONCLUSIONS OF LAW

1. Jurisdiction properly lies within this Court pursuant to Title 28 United States Code Sections 1331, 1346, and 1441.

2. Venue properly lies within this judicial district pursuant to Title 28 United States Code Section 1391.

3. The applicable statute at issue, Title 7 United States Code §1926, provides in pertinent part as follows:

> (a)(1) The Secretary is . . . authorized to make or insure loans to associations, including corporations not operated for profit . . . and public and quasi-public agencies to provide for the application or establishment of . . . conservation, development, use, and control of water, and the installation or improvement of . . . essential community facilities including necessary related equipment . . . and to furnish financial assistance or other aid in planning projects for such purposes. . . .
>
> . . .
>
> (b) The *service provided* or *made available* through any such association shall not be curtailed or limited by inclusion of the area served by such association within the boundaries of any municipal corporation or other public body, or by the granting of any private franchise for similar service within such area

> during the term of such loan; nor shall the happening of any such event be the basis of requiring such association to secure any franchise, license, or permit as a condition to continuing to serve the area served by the association at the time of the occurrence of such event. (Emphasis added.)

4. A general rule of statutory construction is that a statute be construed in its entirety and that every word be given effect. With this in mind, the Court finds that "service provided" and service "made available" are references to two separate, distinct situations and are not mere surplusage. As such, "service provided" is satisfied because District No. 2 was providing service to other undisputed portions of its territory at the time the conflict arose; and, service "made available" is satisfied because the evidence shows District No. 2 had service available to the area in question by virtue of its Union Avenue water line and its responsibilities to applicants in its territory.

5. The legislative history of the statute indicates Congress' intent to protect its borrowers from encroachment by competitive facilities. The Senate Report found in U.S. Code Cong. & Adm. News (87th Cong. 1961) §2243 *et seq.*, states, in relevant part, that this title:

> 9. Prohibits curtailment of a water association borrower's service as a result of inclusion of its service area within the boundaries of any public body or as the result of the granting of any private franchise for similar service in such area.
>
> . . .
>
> A new provision has been added to assist in protecting the territory served by such an association

> facility against competitive facilities, which might otherwise be developed with the expansion of the boundaries of municipal and other public bodies into an area served by the rural system.

The Court finds the service area referred to in the statute and the legislative history is logically the entire territory of a water district such as defendant District No. 2. Congressional concern is directed at protecting the territory of the rural water districts, and nothing in the legislative history makes that protection dependent upon a condition that the water district have water lines in place all over its territory or in the particular section being infringed upon by a competitor.

The Court sees nothing in the statute that would refute the reasonable interpretation that the protection contemplated by Congress extends to the entire territory allocated to a water district so long as the water district does in fact provide water services somewhere within its territory.

6. The encroachment of plaintiff Glenpool into the territory of defendant District No. 2 has impaired the FmHA security interest and real estate mortgage, even though payments on same are current and in good standing.

7. The legislature of Oklahoma has provided, in pertinent part, at Title 82 O.S. 1981 §1324.10:

> A. Every district incorporated hereunder . . . shall have power: . . .
>
> 4. To borrow money and otherwise contract indebtedness for the purposes set forth in this act, and, without limitation of the generality of the foregoing,

to borrow money and accept grants from the United States of America, or from any corporation or agency created or designated by the United States of America, and, in connection with such loan or grant, to enter into such agreements as the United States of America or such corporation or agency may require. . . .

These two statutes, 82 O.S. §1324.10 and 7 U.S.C. §1926(b), cannot constitutionally be construed in light of each other as authorizing defendant water district to create exclusive rights through its contractual powers. The Oklahoma legislature itself, which gives the contractual powers to the water district, is prohibited from conferring exclusive rights by reason of the pertinent provisions of the Oklahoma Constitution, Art.5, Section 51 and Art.18, Section 5, which provide:

§51. Exclusive rights, privileges or immunities.

The Legislature shall pass no law granting to any association, corporation, or individual any exclusive rights, privileges, or immunities within this State.

§5(a). Grant, extension or renewal—Approval by voters—Term.

No municipal corporation shall ever grant, extend, or renew a franchise, without the approval of a majority of the qualified electors residing within its corporate limits, who shall vote thereon at a general or special election; and the legislative body of any such corporation may submit any such matter for approval or disapproval to such electors at any general municipal election, or call a special election for such purpose at any time upon thirty days

notice; and no franchise shall be granted, extended, or renewed for a longer term than twenty-five years.

See also Comanche County Rural Water District No. 1 v. Lawton, 501 P.2d 490 (Okl.1972).

8. The injunction prayed for by defendant District No. 2 is therefore denied. The relief prayed by both parties for declaratory judgment is also denied. This Court cannot and does not declare either party to be the holder of an exclusive right to furnish water services to the property area in question, Eden South.

IT IS SO ORDERED this 14th day of July, 1986.

/s/ H. Dale Cook
H. Dale Cook
Chief Judge, U. S. District Court

(Filed July 16, 1986)

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF OKLAHOMA

No. 84-C-415-C

GLENPOOL UTILITY SERVICES AUTHORITY,
a Utility Trust,
Plaintiff,

vs.

CREEK COUNTY RURAL WATER DISTRICT NO. 2,
and JODY SWEETIN, an individual,
Defendants,

-and-

CREEK COUNTY RURAL WATER DISTRICT NO. 2,
Third Party Plaintiff,

vs.

FARMERS HOME ADMINISTRATION, UNITED
STATES DEPARTMENT OF AGRICULTURE,
UNITED STATES OF AMERICA,
Third Party Defendants.

JUDGMENT

This matter came on for non-jury trial before the Court, and the issues having been duly tried and a decision having been duly rendered in accordance with the Findings of Fact and Conclusions of Law filed simultaneously herein,

IT IS HEREBY ORDERED AND ADJUDGED that defendant District No. 2's request for an injunction be denied.

IT IS FURTHER ORDERED AND ADJUDGED that the parties' request for declaratory judgment be denied.

The Court reserves ruling on the matter of costs and attorney fees until proper documents regarding same are presented to the Court.

IT IS SO ORDERED this 15th day of July, 1986.

/s/ H. Dale Cook
H. Dale Cook
Chief Judge, U. S. District Court

(Filed November 21, 1988)

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 86-2226

GLENPOOL UTILITY SERVICES AUTHORITY,
a Utility Trust,
Plaintiff-Appellee,

v.

CREEK COUNTY RURAL WATER DISTRICT NO. 2,
Defendant-third-party-plaintiff-Appellant,

and

JODY SWEETIN, an Individual,
Defendant-intervenor,

v.

FARMERS HOME ADMINISTRATION, UNITED STATES DEPARTMENT OF AGRICULTURE, UNITED STATES OF AMERICA,
Third-party-defendants.

No. 86-2410

GLENPOOL UTILITY SERVICES AUTHORITY,
a Utility Trust,
Plaintiff-Appellee,

v.

CREEK COUNTY RURAL WATER DISTRICT NO. 2,
Defendant-third-party-plaintiff-Appellee,

and

JODY SWEETIN, an Individual,
Defendant-intervenor,

v.

FARMERS HOME ADMINISTRATION, UNITED STATES DEPARTMENT OF AGRICULTURE, UNITED STATES OF AMERICA,
Third-party-defendants-Appellants.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA
(D.C. No. 84-C-415-C)

Peter Steenland and Stephen L. Andrew (D. Kevin Ikenberry, of McCormick, Andrew & Clark, A Professional Corporation, of Tulsa, Oklahoma, with them on the briefs), of McCormick, Andrew & Clark, A Professional Corporation, of Tulsa, Oklahoma, for the Defendant-Appellant and Third Party Plaintiff-Appellant Creek County Rural Water District No. 2.

Phil Frazier, of Frazier, Smith & Phillips, of Tulsa, Oklahoma, for the Plaintiff-Appellee Glenpool Utility Services Authority, a Utility Trust.

F. Henry Habicht II, Assistant Attorney General; Layn R. Phillips, United States Attorney, and Peter Bernhardt, Assistant United States Attorney, Tulsa, Oklahoma; and Peter R. Steenland, Jr., Martin W. Matzen, Laura E. Frossard, Attorneys, Department of Justice, Washington, D.C., on the brief for the Third Party Defendant-Appellant Farmers Home Administration.

Neal E. McNeill, City Attorney, and Patrick T. Boulden, Assistant City Attorney, Tulsa, Oklahoma, filed an amicus curiae brief for the City of Tulsa, Oklahoma.

Michael R. Vanderburg, Broken Arrow, Oklahoma, filed an amicus curiae brief for the City of Broken Arrow, Oklahoma.

Jay M. Galt, of Looney, Nichols, Johnson & Hayes, of Oklahoma City, Oklahoma, filed an amicus curiae brief for the Oklahoma Rural Water Association.

Ronald D. Cates, of the Owasso Public Works Authority, Owasso, Oklahoma, filed an amicus curiae brief for the Owasso Public Works Authority.

Lynn C. Rogers, of the Oklahoma Association of Municipal Attorneys, and Diane Pedicord, of the Oklahoma Municipal League, filed an amicus curiae brief for the Oklahoma Association of Municipal Attorneys and the Oklahoma Association of Municipal Attorneys.

Before TACHA, BARRETT, and EBEL, Circuit Judges.

TACHA, Circuit Judge.

This is an appeal from a final judgment of the district court denying declaratory and injunctive relief in a suit concerning the rights to furnish water service to an annexed area of land. The issues on appeal are whether the defendant rural water district possesses a right, as against Glenpool, to furnish water service to the area in question; if such a right exists, whether it was granted by the Oklahoma Legislature; and, if such a grant was made, whether it violates provisions of the Oklahoma Constitution or the United States Constitution. We reverse in part and remand.

In 1964, the Board of County Commissioners of Creek County, Oklahoma, incorporated Creek County Rural

Water District No. 2 (District No. 2) to provide water service within specific territorial limits. District No. 2 obtained a loan from the Farmers Home Administration (FmHA) and used the funds as construction money for its rural water system. As security for the loan, the FmHA received a mortgage covering rights, facilities, and real property owned by District No. 2. In 1967, District No. 2 annexed additional territory within Creek and Tulsa Counties, including an area now known as Eden South.

Plaintiff Glenpool Utility Services Authority (Glenpool) is a public trust, with the City of Glenpool, Oklahoma, as its beneficiary. It was created pursuant to the laws of the State of Oklahoma for the purpose of providing utility services, including water and sewer service, to areas inside and outside the corporate limits of the City of Glenpool. In 1983, the City of Glenpool annexed new territory into its city limits. The newly annexed property included the area known as Eden South, although Eden South also remained within the territory of District No. 2. At the time of the annexation, Glenpool was aware that District No. 2 claimed the exclusive right to serve the Eden South area with water.

Plaintiff Glenpool brought an action in Oklahoma state court against defendant District No. 2 requesting a declaratory judgment that Glenpool possessed the exclusive right to furnish water to the Eden South area. Defendant District No. 2 counterclaimed, asking for a declaratory judgment that it had the exclusive right to furnish water to the Eden South area and requesting an injunction enjoining the plaintiff from constructing water service lines to the area. After District No. 2

brought a third party petition joining FmHA as the holder of a real estate mortgage on land that included the Eden South area, the action was removed to federal district court. That court allowed Mr. Jody Sweetin, owner of the Eden South property, to intervene as a defendant. At the time of the trial, plaintiff Glenpool was providing the water service to the individuals residing in Eden South.

The district court found that District No. 2 had a water line that ran within fifty feet of the Eden South property and that any prospective user within the District No. 2 territory could receive water service from District No. 2 simply by making application to it. The water district would then be under an obligation to provide the service, even if that provision would require a line extension or a road bore. Because of these facts, the district court found that District No. 2 could and would provide water service to Eden South within a reasonable time of an application for such service.

The district court applied the state statute that empowers a rural water district to borrow funds from the federal government, Okla. Stat. tit. 82, § 1324.10 (Supp. 1988), the Oklahoma constitutional prohibition against the legislature granting an exclusive right, Okla. Const. art. 5, § 51, and the federal statute that protects an association which has borrowed federal funds from certain curtailments of its service during the term of the loan, 7 U.S.C. § 1926(b). The court held that in light of these statutory and constitutional provisions, neither Glenpool nor District No. 2 had an exclusive right to furnish water service to the Eden South property. District No. 2 and FmHA appealed.

We review the district court's conclusions of law denying relief to District No. 2. Conclusions of law are subject to de novo review upon appeal, *Boise City Farmers Coop. v. Palmer*, 780 F.2d 860, 866 (10th Cir. 1985), even if the appellate court relies upon the findings of fact below, *United States v. Mississippi Valley Generating Co.*, 364 U.S. 520, 526 (1961).

Congress enacted 7 U.S.C. § 1926(b) as part of a federal statutory scheme to extend loans and grants to certain associations providing soil conservation practices, water service or management, waste facilities, or essential community facilities to farmers, ranchers, and other rural residents. 7 U.S.C. § 1926. Regarding those associations, the statute states:

> The service provided or made available through any such association shall not be curtailed or limited by inclusion of the area served by such association within the boundaries of any municipal corporation or other public body, or by the granting of any private franchise for similar service within such area during the term of such loan; nor shall the happening of any such event be the basis of requiring such association to secure any franchise, license, or permit as a condition to continuing to serve the area served by the association at the time of the occurrence of such event.

7 U.S.C. § 1926(b).

In construing a statute, a court must begin with the statutory language itself. *Wilson v. Stocker*, 819 F.2d 943, 948 (10th Cir. 1987). When, as in this case, the statute is unambiguous and free of irrational result, that language controls. *Edwards v. Valdez*, 789 F.2d 1477, 1481 (10th Cir. 1986).

We agree with the Fifth Circuit that section 1926(b) "indicates a congressional mandate that local governments not encroach upon the services provided by [federally indebted water] associations, be that encroachment in the form of competing franchises, new or additional permit requirements, or similar means." *City of Madison, Miss. v. Bear Creek Water Ass'n, Inc.*, 816 F.2d 1057, 1059 (5th Cir. 1987); *accord Jennings Water, Inc. v. City of North Vernon, Ind.*, 682 F. Supp. 421, 425 (S.D. Ind. 1988) ("[S]tatute . . . should be applied broadly to protect rural water associations indebted to the FmHA from competition from expanding municipal systems."); *Rural Water Dist. No. 3 v. Owasso Utils. Auth.*, 530 F. Supp. 818, 824 (N.D. Okla. 1979) (statute prohibits municipalities' exercise of their powers to sell water "when their exercise would result in competition with a Rural Water District"). The present case, however, is a simpler one than that confronted by the Fifth Circuit.

The face of the statute makes clear that Congress protected the indebted rural association from curtailment or limitation by impinging municipal corporations. The district court correctly held that District No. 2 came within the purview of section 1926(b) and had met the statute's threshold requirements, having a continuing indebtedness under section 1926 and having "made [service] available" to the area, by virtue of its line adjacent to the property and its responsibilities to applicants within its territory. The statute prohibits Glenpool from using annexation of Eden South to curtail or limit the service made available by District No. 2. Glenpool may not legally use "inclusion" of Eden South "within the boundaries of any municipal corporation" as a springboard for providing water service to the area, and thereby limit the service made available by District No. 2.

Glenpool contends on appeal that the present situation is one in which a rural water district and a federal agency have attempted to contract away the property rights of a third party (Glenpool) and that such an action violates the tenth amendment to the U.S. Constitution by infringing unconstitutionally upon the powers and duties of local governments. Glenpool's contentions miss the mark.

The tenth amendment to the U.S. Constitution provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

U.S. Const. amend. X. The concerns preserved in the tenth amendment are of vital importance, and we do not deprecate efforts to preserve the essential structure of our federal system. A constitutional analysis in the present case, however, demonstrates that the statute does not violate the tenth amendment.

Section 1926(b) of title 7 of the United States Code is most appropriately viewed as a congressional enactment resting upon Congress' powers under the spending clause of the United States Constitution.[1] *See City of Madison, Miss. v. Bear Creek Water Ass'n, Inc.*, 816 F.2d 1057, 1061 (5th Cir. 1987). That clause provides "Con-

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1. Even if one views § 1926(b) as a congressional enactment resting upon Congress' powers under the commerce clause, U.S. Const. art. I, § 8, cl. 3, an attack upon the constitutionality of the statute must surely fail here, especially in the aftermath of *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 552 (1985) ("State sovereign interests, then, are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power.").

gress shall have the power to . . . provide for the . . . general welfare of the United States." U.S. Const. art. I, § 8, cl. 1. The spending clause gives a wide range of discretion to *Congress,* not the courts. *Helvering v. Davis,* 301 U.S. 619, 640 (1937). "The discretion belongs to Congress, unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment." *Id.* Here the congressional action is well within that wide discretionary range.

In examining whether a congressional action under the broad powers of the spending clause is constitutional, we must ascertain if the state has accepted the federal funds, for acceptance of the funds entails acceptance of the conditions that accompany them.

> [L]egislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the "contract."

Pennhurst State School & Hosp. v. Halderman, 451 U.S. 1, 17 (1981) (citing *Steward Mach. Co. v. Davis,* 301 U.S. 548, 585-98 (1937); *Harris v. McRae,* 448 U.S. 297 (1980)). Congress must impose any conditions unambiguously, *id.*, and it may not impose conditions "unrelated in subject-matter to activities fairly within the scope of national power and policy," *Steward Mach. Co. v. Davis,* 301 U.S. 548, 590 (1937). Here, section 1926 sets forth both the mechanism for making the loans and the conditions that are to accompany them. The conditions of section 1926(b), moreover, serve as protection of federal funds advanced under the congressional spend-

ing power and pursuant to a national policy concerned with water management and rural populations. Congress clearly acted within its powers.

Oklahoma law provides for the creation of rural water districts by boards of county commissioners. Okla. Stat. tit. 82, § 1324.6 (Supp. 1988). Since 1965, by statute "the district shall be . . . an agency and legally constituted authority of the State of Oklahoma" for the purposes set forth in the statutory provisions. Okla. Stat. tit. 82, § 1324.6 (Supp. 1988); *id.*, § 1306 (1970) (repealed 1972) (predecessor of § 1324.6). Since 1963, Oklahoma law has specifically stated that rural water districts created under these statutory provisions are empowered

> to borrow money and accept grants from the United States of America, or from any corporation or agency created or designated by the United States of America, and, in connection with any such loan or grant, to enter into such agreements as the United States of America or such corporation or agency may require.

Okla. Stat. tit. 82, § 1324.10(4) (Supp. 1988); *id.*, § 1309 (4) (1970) (repealed 1972) (predecessor of § 1324.10). Oklahoma thus authorized District No. 2 to borrow from the federal government and to enter into any required agreements in connection with those loans. In so borrowing, Oklahoma—through its authorized entity District No. 2—bound itself and all of its subdivisions, including the City of Glenpool, to the conditions it had accepted. When, as in this case, the requirements of constitutional analysis under the spending clause have been met, the tenth amendment does not stand as a bar to congressional action. *See Oklahoma v. United States Civil Serv.*

Comm'n, 330 U.S. 127, 143 (1947). The State bound itself by accepting a condition legitimately within the discretionary range of Congress.

Glenpool contends that the Oklahoma statute authorizing the water district to borrow from the federal government, coupled with the actual contracting of the water district with the FmHA, amounts to an attempted granting of an exclusive right by the Oklahoma Legislature, in contravention of the Oklahoma Constitution. We disagree. The Oklahoma Constitution provides in article 5, section 51 that

> [t]he Legislature shall pass no law granting to any association, corporation, or individual any exclusive rights, privileges, or immunities with this State.

Okla. Const. art. 5, § 51. As shown above, the action of the Oklahoma Legislature in this case amounts to having authorized the acceptance of a condition rather than having granted an exclusive right. The district's right to exclude Glenpool's water service here was granted to the rural water district by the *federal* legislature through section 1926(b), and not by the Oklahoma state legislature. Congress granted District No. 2 the right to be free from municipal intrusion upon its water service during the time of its indebtedness, and Congress can terminate that right at any time.

Finally, there are several respects in which the right that we find District No. 2 to possess here is a qualified, and not an "exclusive," right. It is a right that is not permanent, but contingent upon the district's outstanding federal debt; it does not prevent the municipality from regulating such aspects as water lines for

fire hydrants; and it does not prevent the municipality from purchasing facilities from the district, if done pursuant to FmHA regulations. *See City of Madison, Miss. v. Bear Creek Water Ass'n, Inc.*, 816 F.2d 1057, 1061 (5th Cir. 1987) (listing above factors and stating "[t]he limits on the provision of water service are thus restricted in time and in scope so as not to disable the city severely from performing its governmental function"). The Oklahoma constitutional provision is therefore not applicable here.[2]

Defendant District No. 2 contends that, even if the Oklahoma Legislature granted an exclusive right to the district, the Oklahoma constitutional provision barring such a grant is preempted by 7 U.S.C. § 1926(b) under the supremacy clause of the United States Constitution. U.S. Const. art. 6, cl. 2. Because we hold that the Oklahoma constitutional provision is not applicable to this case, we need not reach that federal constitutional issue.

We decide, furthermore, only among the parties before the court concerning the right to furnish water to the Eden South property. Absolute exclusivity of any such right is beyond the scope of this dispute.

Congress acted within its power in passing 7 U.S.C. § 1926. Oklahoma authorized District No. 2 to borrow

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2. Even if one accepts Glenpool's view of the Oklahoma legislative action, it is not at all clear that we must reach the Oklahoma constitutional issue. Oklahoma case law contains clear reference to exemptions from article 5, § 51 on the basis of police power needed for the public interest, *see Public Serv. Co. v. Caddo Elec. Coop.*, 479 P.2d 572, 577, 581 (Okla. 1971), and on the basis of status as a state "agency," *see In re Oklahoma Turnpike Auth.*, 221 P.2d 795, 807 (Okla. 1950); Okla. Att'y Gen. Op. No. 81-165 (1981). Article 5, § 51 "was intended to preserve equality between citizens . . . who are similarly situated." *Kimery v. Public Serv. Co.*, 622 P.2d 1066, 1071 (Okla. 1980) (citation omitted).

under that legislation, and in so doing accepted the conditions accompanying any such loans. We hold that Glenpool is precluded by the statute from curtailing District No. 2's service by including the district's territory within the boundaries of Glenpool, and that here there was no *state* legislative grant of an exclusive right. We reverse the portion of the district court's judgment denying an exclusive right to District No. 2 to the extent that that judgment is inconsistent with this opinion and remand for entry of judgment and any proceedings necessary to carry out this order.

REVERSED IN PART AND REMANDED.

DECEMBER 23, 1988

Before the Honorable Deanell R. Tacha, Honorable James E. Barrett and Honorable David M. Ebel, Circuit Judges

---

No. 86-2226

GLENPOOL UTILITY SERVICES AUTHORITY,
a Utility Trust,
Plaintiff-Appellee,

v.

CREEK COUNTY RURAL WATER DISTRICT NO. 2,
Defendant-third-party-plaintiff-Appellant,

and

JODY SWEETIN, an Individual,
Defendant-intervenor,

v.

FARMERS HOME ADMINISTRATION, UNITED STATES DEPARTMENT OF AGRICULTURE, UNITED STATES OF AMERICA,
Third-party-defendants.

No. 86-2410

GLENPOOL UTILITY SERVICES AUTHORITY,
a Utility Trust,
Plaintiff-Appellee,

v.

CREEK COUNTY RURAL WATER DISTRICT NO. 2,
Defendant-third-party-plaintiff-Appellee,

and

JODY SWEETIN, an Individual,
Defendant-intervenor,

v.

FARMERS HOME ADMINISTRATION, UNITED STATES DEPARTMENT OF AGRICULTURE, UNITED STATES OF AMERICA,
Third-party-defendants-Appellants.

This matter comes on for consideration of appellee's petition for rehearing in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied.

/s/ Robert L. Hoecker
Robert L. Hoecker, Clerk

Supreme Court, U.S.
FILED
MAR 18 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1559

IN THE

Supreme Court of the United States

OCTOBER TERM 1988

GLENPOOL UTILITY SERVICES AUTHORITY,
A Utility Trust,
Plaintiff-Petitioner,

v.

CREEK COUNTY RURAL WATER DISTRICT NO. 2,
Defendant-Third-Party-Plaintiff-Respondent,

and

JODY SWEETIN, an Individual,
Defendant-Intervenor,

v.

FARMERS HOME ADMINISTRATION, UNITED STATES DEPARTMENT OF AGRICULTURE, UNITED STATES OF AMERICA,
Third-Party-Defendants-Respondents.

GLENPOOL UTILITY SERVICES AUTHORITY,
A Utility Trust,
Plaintiff-Petitioner,

v.

CREEK COUNTY RURAL WATER DISTRICT NO. 2,
Defendant-Third-Party-Plaintiff-Respondent,

and

JODY SWEETIN, an Individual,
Defendant-Intervenor,

v.

FARMERS HOME ADMINISTRATION,
UNITED STATES DEPARTMENT OF AGRICULTURE,
UNITED STATES OF AMERICA,
Third-Party-Defendants-Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, TENTH CIRCUIT

(Counsel On Inside Front Cover)

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McCORMICK, ANDREW & CLARK
A Professional Corporation
Joseph A. McCormick,
Counsel of Record
Suite 100, Tulsa Union Depot
111 East First Street
Tulsa, Oklahoma 74103
(918) 583-1111

Attorneys for Creek County
Rural Water District No. 2

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No. 88-1559

IN THE

Supreme Court of the United States

OCTOBER TERM 1988

GLENPOOL UTILITY SERVICES AUTHORITY,
A Utility Trust,

Plaintiff-Petitioner,

v.

CREEK COUNTY RURAL WATER DISTRICT NO. 2,
Defendant-Third-Party-Plaintiff-Respondent,

and

JODY SWEETIN, an Individual,

Defendant-Intervenor,

v.

FARMERS HOME ADMINISTRATION, UNITED STATES DEPARTMENT OF AGRICULTURE, UNITED STATES OF AMERICA,
Third-Party-Defendants-Respondents.

GLENPOOL UTILITY SERVICES AUTHORITY,
A Utility Trust,

Plaintiff-Petitioner,

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CREEK COUNTY RURAL WATER DISTRICT NO. 2,
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JODY SWEETIN, an Individual,

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v.

FARMERS HOME ADMINISTRATION,
UNITED STATES DEPARTMENT OF AGRICULTURE,
UNITED STATES OF AMERICA,
Third-Party-Defendants-Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, TENTH CIRCUIT

STATEMENT OF THE CASE

Creek County Rural Water District No. 2 ("District No. 2") is a rural water provider and borrower from the Farmers Home Administration ("FmHA"). *Petition for Writ of Certiorari ("Petition")* at A15-A16. District No. 2 used the loan proceeds obtained from the FmHA for the construction of its rural water system. *Id.* Included within the territory of District No. 2 at the time it became indebted to FmHA was a geographic area now known as Eden South. *Id.* Eden South is a residential subdivision which was annexed into the City of Glenpool ("City") on January 4, 1983. *Petition* at A5.

Petitioner, Glenpool Utility Services Authority ("Glenpool"), began providing water service to Eden South after annexation by the City. *Petition* at A16. Both the City and Glenpool knew, at the time Eden South was annexed into the City, that Eden South was in the service territory of District No. 2. *Id.* Although Glenpool was itself an FmHA borrower at the time Eden South was annexed, it paid off its indebtedness prior to trial. *Petition* at A4.

Municipalities or other public bodies are forbidden by the provisions of 7 U.S.C. § 1926(b) from encroaching on the service territory of an FmHA borrower during the term of the FmHA loan. Both the District Court and the Court of Appeals held that District No. 2 came within the provisions of 7 U.S.C. § 1926(b). The Court of Appeals also held that District No. 2 was entitled to the statutory protection afforded to District No. 2's service area. *Petition* at A7-A8, A19. The District Court, however, refused

to enforce the exclusive right afforded District No. 2 by 7 U.S.C. § 1926(b) on the grounds that Oklahoma Constitution Article V, § 51 prohibits the Oklahoma legislature from passing a law granting an exclusive franchise to a corporation. *Petition* at A8-A9. An enabling act authorizing rural water districts to borrow from FmHA was passed by the Oklahoma legislature as Oklahoma Statute title 82, § 1324.10(14). The District Court concluded that enforcement of the rights afforded District No. 2 by the provisions of 7 U.S.C. § 1926(b) violated the Oklahoma Constitution. *Id.*

The District Court refused to enforce District No. 2's rights and denied District No. 2's request for declaratory relief that it had the exclusive right to serve Eden South. *Petition* at A9-AlO. District No. 2 appealed the denial of its request. *See Petition* at A17.

The United States Court of Appeals for the Tenth Circuit reversed that portion of the District Court's judgment which denied District No. 2 the exclusive right to serve Eden South. *Petition* at A25. The Court of Appeals found that Oklahoma's Constitution did not apply because federal law, not the Oklahoma legislature, created District No. 2's exclusive right. *Petition* at A23.

SUMMARY OF ARGUMENT

Neither of Glenpool's questions for review falls within the guidelines of Supreme Court Rule 17.1. The first question for review posed by the Petitioner only seeks review of the validity under Oklahoma's constitution of an

Oklahoma statute. No federal question is implicated or raised by the question as presented. Furthermore, the validity of the state statute under Oklahoma' s Constitution is moot since the Court of Appeals ruled that Congress, not Oklahoma's legislature, granted the exclusive rights afforded by 7 U.S.C. § 1926(b).

Glenpool's second question for review, as proposed by the Petitioner, merely asks this Court to determine whether Glenpool has the right to serve Eden South under 7 U.S.C. § 1926(b). Glenpool, however, did not appeal the District Court's judgment denying Glenpool such a right. Furthermore, the question of Glenpool's rights under 7 U.S.C. § 1926(b) is moot since Glenpool paid off and satisfied its FmHA loan prior to trial in the District Court.

ARGUMENT

I. Besides being moot, Glenpool's First Question as to the validity of Oklahoma Statute Title 82, § 1324.10 is a question of state law.

Glenpool asks this Court to consider whether Oklahoma Constitution Article V, § 51 invalidates Oklahoma Statute title 82, § 1324.10, the statute which authorized District No. 2 to borrow from FmHA. This question was never reached by the Tenth Circuit because it found that Congress, not the Oklahoma legislature, granted District No. 2's exclusive right to serve Eden South. *Petition* at A24, n.2. The question of whether Congress or the Oklahoma legislature granted District No. 2 its exclusive right has not been presented to this Court for review and, pur-

suant to Supreme Court Rule 17.1, should not be considered. There is, therefore, no reason to take up the moot issue of the validity of Oklahoma Statute title 82, § 1324.10 under Oklahoma's Constitution, since the outcome of this case turned entirely on the fact that Oklahoma's legislature did not grant the exclusive right.

Even if the first question posed by Glenpool were not moot, however, it does not fall within any of the categories set forth in Supreme Court Rule 17.1, which provides as follows:

> .1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.
>
> (a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.
>
> (b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

> (c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

These categories all concern situations where review of a *federal* question is sought. Glenpool's first question of whether Oklahoma Statute title 82, § 1324.10 is valid under Oklahoma's Constitution is purely one of *state* law.

Glenpool argues, though, that it is "imperative that final decision be rendered regarding the application of State Constitutional Law as it affects the enabling statute of the State of Oklahoma." *Petition* at 6. Even if this statement were true, only Oklahoma's Supreme Court could render such a desired final decision. Although this Court, like any federal court, may consider questions of state law under *Erie Railroad Co. v. Tompkins,* 304 U.S. 64 (1938), its resolution of a state question is binding only on the parties. Oklahoma's state courts would have no obligation to follow this Court's pronouncement of the law of Oklahoma. *See Thompson v. Consolidated Gas Utilities Corporation,* 300 U.S. 55 (1937) (a decision of the United States Supreme Court involving a state statute which has not been interpreted by a state court disposes of the particular case but cannot settle the issue of proper construction of the statute).

The same would hold true in any other state, if any, that has a constitutional provision similar to Oklahoma Constitution Article V, § 51. Consequently, none of the

"special and important reasons" required under Supreme Court Rule 17.1 for granting a Petition for Writ of Certiorari exist in this case.

II. Besides being moot, Glenpool's Second Question for review was not raised on appeal.

Glenpool's second question for review essentially asks this Court to review whether Glenpool should have any rights under 7 U.S.C. § 1926(b) to serve Eden South since it was also an FmHA borrower at the time it annexed the housing addition. Both parties originally sought declaratory relief in the District Court, but the District Court held that neither Glenpool nor District No. 2 had the exclusive right to serve Eden South. Glenpool did not seek reversal of that part of the judgment denying its request for declaratory judgment. Glenpool's second question for review, therefore, was not raised on appeal and is thus not subject to review by this Court. *Ellis v. Dixon*, 349 U.S. 458 (1955).

However, even if the second question had been raised on appeal, it is now moot. The Petitioner' s second question suggests that being an FmHA borrower affords a municipality protection under 7 U.S.C. § 1926(b) so as to allow it to raid with impunity a rural water district's territory. Regardless of any merit of such a proposition, which District No. 2 believes is entirely lacking, the fact remains that Glenpool was not an FmHA borrower at the time of trial. *Petition* at 4. The protection provided by 7 U.S.C.§ 1926(b) exists only "during the term of such loan." Because the term of Glenpool's FmHA loan had

ended, whatever rights might have been afforded Petitioner by 7 U.S.C. § 1926(b) no longer existed.

CONCLUSION

For the reasons set forth above, this Court should deny Glenpool's Petition for Writ of Certiorari to the United States Court of Appeals, Tenth Circuit.

McCORMICK, ANDREW & CLARK
A Professional Corporation
Joseph A. McCormick,
Counsel of Record
Suite 100, Tulsa Union Depot
111 East First Street
Tulsa, Oklahoma 74103
(918) 583-1111

Attorneys for Creek County
Rural Water District No. 2

(3)

No. 88-1559

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In the Supreme Court of the United States

OCTOBER TERM, 1988

GLENPOOL UTILITY SERVICES AUTHORITY, PETITIONER

v.

CREEK COUNTY RURAL WATER DISTRICT NO. 2, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

WILLIAM C. BRYSON
Acting Solicitor General
DONALD A. CARR
Acting Assistant Attorney General
PETER R. STEENLAND, JR.
VICKI L. PLAUT
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

13pp

QUESTION PRESENTED

Whether Oklahoma state law prohibits a water service provider, which had borrowed funds from the Farmers Home Administration, from exercising the exclusive distribution right guaranteed to debtors under Section 306(b) of the Consolidated Farmers Home Administration Act of 1961, 7 U.S.C. 1926(b).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A13-A25) is reported at 861 F.2d 1211. The opinion of the district court (Pet. App. A1-A12) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on November 21, 1988. A petition for rehearing was denied on December 23, 1988 (Pet. App. A26-A27). The petition for a writ of certiorari was filed on March 18, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1964, the Board of County Commissioners of Creek County, Oklahoma, incorporated respondent Creek

County Rural Water District No. 2 (District No. 2) to provide water service within a specified rural area in Creek and Tulsa Counties in northeastern Oklahoma. Under its charter, District No. 2 must provide water service, upon request, to any area within its territory. Pet. App. A3-A6. Under Oklahoma law, such rural water districts have the power

> [t]o borrow money * * * and accept grants from the United States of America, or from any corporation or agency created or designated by the United States of America, and, in connection with such loan or grant, to enter into such agreements as the United States of America or such corporation or agency may require * * *.

Okla. Stat. tit. 82, § 1324.10.A.4 (Supp. 1989).[1] With this authority, District No. 2 obtained a $920,000 loan from respondent Farmers Home Administration (FmHA) in 1965 for the purpose of constructing the water system. As security for the loan, the FmHA received a mortgage covering rights, facilities, and real property owned by District No. 2. That loan is still outstanding. Pet. App. A4-A5, A16.[2]

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[1] This provision, enacted in 1972, retains the identical language of the prior state law authorizing creation of rural water districts. See Okla. Stat. tit. 82, § 1309(4) (1970) (repealed 1972).

[2] Under the Consolidated Farmers Home Administration Act of 1961 (Act), Congress sought to protect water service providers in debt to the FmHA by forbidding competition with those providers during the term of the outstanding federal loans. Section 306(b) of the Act, 7 U.S.C. 1926(b), therefore states that

> [t]he service provided or made available through any such [water service provider] shall not be curtailed or limited by inclusion of the area served by such [provider] within the boundaries of any municipal corporation or other public body, or by the granting of any private franchise for similar service within such

In March 1967, District No. 2 annexed additional territory, including an area that became the residential subdivision known as "Eden South." In January 1983, the City of Glenpool also annexed territory that included Eden South. Eden South's owner knew that District No. 2 claimed an exclusive right to service the area; in fact, District No. 2's water lines were across the street from Eden South. Eden South's owner nevertheless laid water lines from his property to connect with the water service provided by petitioner, Glenpool Utility Services Authority, a public utility trust operated for the benefit of the City of Glenpool. Pet. App. A3-A5.

2. In February 1984, petitioner filed an action against District No. 2 and the owner of Eden South in Oklahoma state court seeking a declaratory judgment that petitioner had the exclusive right to provide water service to Eden South. District No. 2 filed a counterclaim seeking a declaratory judgment that it had that right and an injunction preventing petitioner from providing water service to Eden South. District No. 2 also filed a third-party petition against the FmHA as a necessary party. As a result, the FmHA successfully removed the case to the United States District Court for the Northern District of Oklahoma. Pet. App. A16-A17.

3. After a bench trial, the district court concluded that neither petitioner nor District No. 2 had the exclusive right to provide water service to Eden South, and that District No. 2 was therefore not entitled to an injunction barring petitioner from providing such service (Pet. App. A1-A12).

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area during the term of such loan; nor shall the happening of any such event be the basis of requiring such [provider] to secure any franchise, license, or permit as a condition to continuing to serve the area served by the [provider] at the time of the occurrence of such event.

Although petitioner had been providing water to Eden South, the court found that District No. 2 "could and would provide water service to Eden South within a reasonable time following application [for service]" (*id.* at A6). The court, however, rejected District No. 2's claim to an exclusive right to provide service under Section 306(b) of the Consolidated Farmers Home Administration Act of 1961 (Act), 7 U.S.C. 1926(b) (see note 2, *supra*). In its view, Article 5, Section 51, of the Oklahoma Constitution[3] expressly forbade the creation and operation of such exclusive rights in the state. Pet. App. A9-A10.[4]

Both District No. 2 and the FmHA appealed from the district court's judgment denying declaratory and injunctive relief. Pet. App. A17.

4. The court of appeals reversed, concluding that District No. 2 has the exclusive right to provide water service to Eden South during the term of its indebtedness to the FmHA under Section 306(b) of the Act, 7 U.S.C. 1926(b) (Pet. App. A13-A25). Under the plain terms of the statute, "Congress protected the indebted rural association from curtailment or limitation by impinging municipal corporations" (*id.* at A19). The court of appeals thus agreed with the Fifth Circuit's decision in *City of Madison*

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[3] Okla. Const. art. 5, § 51, provides:

> The Legislature shall pass no law granting to any association, corporation, or individual any exclusive rights, privileges, or immunities within this State.

[4] In addition, the district court concluded that another provision of the state constitution, Article 18, Section 5(a), forbidding municipal corporations from granting any franchises without a referendum, also barred both petitioner's and District No. 2's claims to the exclusive right to service Eden South. Pet. App. A9-A10. The court of appeals did not address this alternative state law ground in reversing the district court's judgment, and petitioner does not present the issue for further review in this Court.

v. *Bear Creek Water Ass'n*, 816 F.2d 1057, 1059 (1987), that the statute shows "a congressional mandate that local governments not encroach upon the services provided by [federally indebted water] associations, be that encroachment in the form of competing franchises, new or additional permit requirements, or similar means" (Pet. App. A19 (internal quotation marks and citation omitted)). Since Congress plainly had the authority to provide such an exclusive right under the Spending Clause, U.S. Const. Art. I, § 8, Cl. 1, and state law enabled District No. 2 to borrow money from the FmHA, see Okla. Stat. tit. 82, § 1324.10.A.4 (Supp. 1989), the court of appeals held that District No. 2 alone is entitled to provide water service to Eden South. Pet. App. A20-A23.

The court of appeals rejected petitioner's claim that Article 5, Section 51, of the Oklahoma Constitution prohibits District No. 2 from exercising the exclusive right to provide water service. That state constitutional provision bars only the state legislature from granting exclusive rights. Here, however, federal law, not any state action, confers the exclusive grant. In other words, District No. 2's "right to exclude Glenpool's water service here was granted to the rural water district by the *federal* legislature through section 1926(b), and not by the Oklahoma state legislature. Congress granted District No. 2 the right to be free from municipal intrusion upon its water service during the time of its indebtedness, and Congress can terminate that right at any time" (Pet. App. A23 (emphasis in original)).[5]

[5] In any event, the court of appeals observed that even if the state constitutional provision applied, state law exceptions to that provision appeared to permit District No. 2 to exercise the exclusive federal right to provide water service. Pet. App. A24 n.2.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Accordingly, no further review is warranted.

1. Petitioner renews its contention (Pet. 6-7) that the court of appeals erred in concluding that the Oklahoma Constitution permits a state-chartered water service provider to exercise the exclusive grant provided by Section 306(b) of the Consolidated Farmers Home Administration Act of 1961, 7 U.S.C. 1926(b). The Court has long made clear, however, that "standing alone, a challenge to state-law determinations by the court of appeals will rarely constitute an appropriate subject of this Court's review." *Haring* v. *Prosise*, 462 U.S. 306, 314 n.8 (1983); see *Volt Information Sciences, Inc.* v. *Board of Trustees*, 109 S. Ct. 1248, 1253 (1989); *Wolf* v. *Weinstein*, 372 U.S. 633, 636 (1963). Petitioner offers no substantial basis for departing from this settled practice.[6] For that reason alone, further review is inappropriate.

In any event, the court of appeals correctly concluded that the arrangement between the state water providers and the FmHA is consistent with the Oklahoma Constitution. Section 306(b) of the Act, 7 U.S.C. 1926(b), protects the FmHA's loans to rural water providers by prohibiting encroaching municipalities from taking over or competing with those providers in debt to the FmHA.[7] Congress,

[6] Petitioner asserts that the court of appeals' decision "will have an effect upon all rural water districts" (Pet. 6). Petitioner, however, does not point to a single other state or local jurisdiction that arguably imposes state law barriers to the exclusive grant provision of Section 306(b) of the Act.

[7] A municipality may, however, acquire the facilities owned by a debtor water service provider so long as it follows applicable federal regulations governing the sale. See 7 C.F.R. 1951.209, 1951.214.

through the statute, has given rural water providers a limited, but exclusive, right to provide water service within their territorial limits for the term of their federal loans. Congress's purpose was plain: "to encourage rural water development by expanding the number of potential users of such systems, * * * [and] to safeguard the viability and financial security of such [water] associations (and FmHA's loans) by protecting them from the expansion of nearby cities and towns." *City of Madison* v. *Bear Creek Water Ass'n*, 816 F.2d 1057, 1060 (5th Cir. 1987) (parentheses in original); see *ibid.* (citing S. Rep. No. 566, 87th Cong., 1st Sess. (1961)).

Article 5, Section 51, of the Oklahoma Constitution, on the other hand, forbids the state legislature from passing any "law granting to any association, corporation, or individual any exclusive rights, privileges or immunities within [Oklahoma]." This provision seeks to ensure that the state legislature "preserve[s] equality between citizens * * * who are similarly situated." *Kimery* v. *Public Serv. Co.*, 622 P.2d 1066, 1071 (Okla. 1980). As the court of appeals correctly reasoned, operation of Section 306(b) of the Act does not offend that constitutional provision where Congress, not the Oklahoma state legislature, effectively has granted the exclusive right to provide water to Eden South. See Pet. App. A23.

Petitioner suggests in passing (Pet. 6) that the state legislature essentially granted that exclusive right by virtue of the state law authorizing water providers to contract with the federal government. See Okla. Stat. tit. 82, § 1324.10.A.4 (Supp. 1989). The Oklahoma Supreme Court, however, has carved out an exemption from the state constitutional bar when the state legislature grants an exclusive right to a state agency performing a public function. See *Public Serv. Co.* v. *Caddo Elec. Coop.*, 479 P.2d 572, 577, 581 (Okla. 1971) (rural electric cooperative); *In*

re Oklahoma Turnpike Auth., 203 Okla. 335, 345, 221 P.2d 795, 807 (1950) (turnpike authority).[8] Accordingly, the court of appeals' treatment of the state constitutional provision's application here is consistent with state law.

2. Petitioner also suggests that this case presents an occasion for the Court to address the "applicability of two water providers both coming under 7 U.S.C. 1926(b) at the same time with both of the water providers seeking to provide service to the same area" (Pet. 9). The record, however, belies this contention. First, the record does not show that petitioner and District No. 2 had FmHA loans outstanding "at the same time" (*ibid.*). On the contrary, petitioner, through the City of Glenpool, repaid its FmHA loan months before the trial began and therefore could no longer claim any rights as a debtor under Section 306(b) of the Act. See Pet. App. A4. Second, the record does not show, as petitioner asserts (Pet. 8-9), that petitioner obtained an FmHA loan and provided water service to Eden South because District No. 2 was unable to meet its service obligation. The district court expressly found that "District No. 2 could and would provide water service to Eden

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[8] But see *Comanche County Rural Water Dist. No. 1* v. *City of Lawton*, 501 P.2d 490, 492-493 (Okla. 1972) (city could sell water outside its limits to consumer within an FmHA-assisted rural water district; court suggests in dictum that state constitution could be an impediment to an exclusive grant under federal law).

At bottom, the court of apppeals' interpretation of the state law question has limited significance. Although not pressed as an independent argument before the court of appeals, see Gov't C.A. Br. 18 n.3, the Supremacy Clause of the federal Constitution would trump any potential impediment raised by the state constitutional provision. Where Congress specifically has intended to protect federally assisted rural water providers under Section 306(b) of the Act, any inconsistent state law provision must yield. See *Lawrence County* v. *Lead-Deadwood School Dist.*, 469 U.S. 256 (1985).

South within a reasonable time following application for same" (Pet. App. A6). Accordingly, this case does not present an issue concerning the application of Section 306(b) to substantially similar competing rural water providers.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WILLIAM C. BRYSON
Acting Solicitor General
DONALD A. CARR
Acting Assistant Attorney General
PETER R. STEENLAND, JR.
VICKI L. PLAUT
Attorneys

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